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No. 02-

IN THE

# Supreme Court of the United States

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

*Cross-Petitioner,*

*v.*

HAROLD E. STEELE, DON PETERSON, REV. DAVID MAYNARD, HARMON WRAY, REV. TOM BAKER, JR., INDUSTRIAL DEVELOPMENT BOARD OF METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, DAVID LIPSCOMB UNIVERSITY, and NATIONSBANK AND NATIONSBANK/TENNESSEE,

*Cross-Respondents.*

ON CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether religious affiliated educational facilities whose construction or renovation were financed through tax exempt industrial revenue bonds which the local government grants in a neutral manner, expends no money and merely acts as a conduit for private investor financing, may be used for religious purposes.

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Cross-Petitioner, Metropolitan Government of Nashville and Davidson County, Tennessee, respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 301 F.3d 401 (6th Cir. 2002) and is reprinted in Appendix A to Petitioners' petition for writ of certiorari [hereinafter, "Pet. App. A."] at pp. 1a-79a. The Opinion of the District Court is reported in *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 117 F. Supp. 2d 693 (M.D. Tenn. 2000) and is reprinted in Appendix B [hereafter, "Pet. App. B. at pp. 80a-168a"].

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

## STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its decision on August 14, 2002. [Pet. App. A. 78a-79a] Petitioners' writ of certiorari was placed on the docket on November 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C.

§ 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioners' petition for writ of certiorari.

## STATEMENT OF THE CASE

Cross-Petitioner, Metropolitan Government of Nashville and Davidson County, Tennessee is a combined city/county government. The original Petitioners Harold Steele, Don Peterson, Rev. David Maynard, Harmon Wray, and Tom Baker Jr. [hereinafter, "Petitioners"] are state and local taxpayers residing in Nashville, Tennessee who contend that the issuance of tax exempt revenue bonds by the Industrial Development Board of the Metropolitan Government of Nashville and Davidson County [hereinafter, "the Board"] for David Lipscomb University [hereinafter, "Lipscomb"] provides an impermissible direct economic benefit to a pervasively sectarian institution in violation of the Establishment Clause.

During the early 1990's, Lipscomb undertook a major redevelopment project on its campus. To finance the project, Lipscomb sought a $15 million, low-interest loan from the Board. The Board approved the loan and financed it by issuing tax exempt industrial development bonds worth $15 million. Its former Mayor, Mayor Bill Boner, granted the approval by the governmental unit having jurisdiction of the area where the facilities to be financed by the bond proceeds would be located. [Pet. App. A. 8a]. The loan from the proceeds of the bonds was used in part to construct and equip a new library, to renovate and convert the old library into administrative offices, and to construct a new intramural athletics building ("or student activities center"), four new

tennis courts, a new baseball stadium, an intramural field, and an addition to the school's Business Center. [Pet. App. B. 83a-84a].

The bonds are typical of industrial revenue bonds that are commonly issued for educational or industrial purposes. The bonds were issued by the Board pursuant to its authority under state law to issue bonds for the financing of projects for "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution, including but not limited to classroom, laboratory, housing, administrative, physical education, and medical research and treatment facilities." Tenn. Code Ann. § 7-53-101(11)(A)(vii) (1990 Supp.).

Because the bonds were issued as education revenue bonds by the Board, the income produced by the bonds is exempt from state taxation. In addition, the bonds were approved by the Metropolitan Government of Nashville and Davidson County's [hereinafter, "Metropolitan Government"] Mayor under the provisions of 26 U.S.C. § 103 (1994), making the interest on the bonds federally tax exempt. [Pet. App. A. 4a-8a]. Consequently, the bonds carried a lower interest rate than conventional financing, and Lipscomb realized the financial benefit through the resulting lower interest rate on its loan from the Board. [App. B. 84a].

Although the Board is an instrumentality of the Metropolitan Government, the bonds do not constitute an indebtedness of either the Board or the Metropolitan Government. [App. B. 86a]. Neither the Board nor the Metropolitan Government can be held liable to pay any portion of the principal or interest on the bonds or any costs incident to their issuance.

> The municipality shall not in any event be liable for the payment of the principal of or interest on any bonds of the corporation, or for the performance of any pledge, mortgage, obligation or agreement of any kind whatsoever which may be undertaken by the corporation, and none of the bonds of the corporation or any of its agreements or obligations shall be construed to constitute an indebtedness of the municipality within the meaning of any constitutional or statutory provision whatsoever.

Tenn. Code Ann. § 7-53-306 (1985). No state or local government tax revenues have been or will be spent as a result of the issuance of the bonds. [Pet. App. B. 86a].

The Loan Agreement between Lipscomb University and the Board contains a restrictive use provision. Section 5.3 on "Special Covenants" states:

> (s) The Borrower will not use the Project or any part thereof for sectarian instruction or as a place of religious worship or in connection with any part of the program of a school or department of divinity for any religious denomination or the training of ministers, priests, rabbis or other similar persons in the field of religion.

[Pet. App. A, p. 6a].

Petitioners filed suit in the United States District Court for the Middle District of Tennessee on May 30, 1991, challenging the validity of the Board's action in issuing tax exempt revenue bonds for the benefit of Lipscomb.

In response to Lipscomb's first motion for summary judgment, the judge originally assigned to this case found that, even if no tax money is spent, taxpayer status is proper grounds for an Establishment Clause challenge to policies that affect the city's general revenue fund. Summary judgment was denied on those grounds and, on interlocutory appeal, the Sixth Circuit Court of Appeals upheld the ruling on standing. *Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County*, 39 F.3d 1182 (6th Cir. 1994) (unpublished table decision), *cert. denied*, 515 U.S. 1121, 115 S. Ct. 2275, 132 L. Ed. 2d 279 (1995).

Lipscomb submitted a renewed motion for summary judgment on December 15, 1995, asserting that the "tax exempt" status the bonds derived from the Board could not have harmed the plaintiffs because the bonds would not have fallen under the Hall Income Tax statute anyway. Tenn. Code Ann. § 67-2-102 (1985). Because the bonds would mature in less than six months, the university argued, they were demand instruments, which are not taxable under the Hall Income Tax statute. The question of whether the bonds would have fallen under the Hall Income Tax statute if they had not been issued as tax-exempt bonds was certified to the Tennessee Supreme Court. The Tennessee Supreme Court ruled that, under the plain meaning of the law, bonds are not demand instruments and, therefore, are taxable. *Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County*, 950 S.W.2d 345 (1997).

Lipscomb filed its third motion for summary judgment, asserting that its receipt of tax exempt bonds for its facilities expansion project was not a violation of the Establishment Clause, nor did it have the primary effect of advancing religion. [Pet. App. B, 87a]. The Metropolitan Government also moved for summary judgment. During oral argument

on the motions, the trial court requested that the Petitioners file a motion for summary judgment. [Pet. App. B. 87a]. Petitioners filed a motion for summary judgment, asserting that Lipscomb was so pervasively sectarian that a substantial portion of its function was subsumed in its religious mission and that the $15 million loan funded by tax revenue bonds had the impermissible effect of promoting religion as a matter of law.

On October 24, 2000, the trial court entered a memorandum and order granting Petitioners' cross-motion for summary judgment and denying the Metropolitan Government's and Lipscomb's respective motions for summary judgment. *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 117 F. Supp. 2d 693 (M.D. Tenn. 2000). [Pet. App. B]. The trial court also determined that the low interest loan of $15 million originated by the Board at Lipscomb's request constituted a direct economic benefit because it advanced Lipscomb's sectarian mission. The trial court issued a permanent injunction enjoining the Board and the Metropolitan Government from using any additional tax exempt revenue bonds for the benefit of Lipscomb or any other pervasively sectarian institution. The trial court awarded Petitioners nominal damages in the amount of $1.00 each and awarded Petitioners' attorneys' fees.

The Metropolitan Government also asked for a stay of the permanent injunction issued by the district court enjoining the Board and the Metropolitan Government from issuing any additional tax-exempt revenue bonds for the benefit of Lipscomb or any other pervasively sectarian institution. On July 13, 2001, the district court denied the Metropolitan Government's motion for a stay pending appeal. Thereafter, in a motion filed on August 13, 2001, the Metropolitan

Government appealed the district court's denial of its motion for a stay pending appeal. In an order entered on September 25, 2001, this Court denied the motion for a stay pending appeal.

On the merits of the appeal, the Sixth Circuit Court of Appeals reversed the trial court, and granted summary judgment to Lipscomb and the Metropolitan Government. *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 301 F.3d 408 (6th Cir. 2002) [Pet. App. A]. The Court of Appeals held that the sectarian status of Lipscomb was not a relevant consideration in its Establishment Clause analysis. [Pet. App. A. 29a.]. The majority opinion further held that the $15 million low interest loan originated by the Board at Lipscomb's request was indirect aid and was analogous to an indirect financial benefit conferred by a religiously neutral tax exemption or charitable deduction. [Pet. App. A. 29a.].

## REASONS FOR GRANTING THE PETITION

Cross-Petitioner requests the Court to grant it a conditional writ of certiorari in this matter to address the important Establishment Clause and Free Exercise Clause issue presented. Should the Court grant Petitioners' writ of certiorari in this case, it will be asked to determine whether the tax exempt bond financing granted Lipscomb University was direct or indirect aid. Assuming the court affirms the Sixth Circuit Court of Appeals and holds that the aid is in fact indirect, then the Metropolitan Government should not be required to monitor and prohibit Lipscomb University from using the financed facilities for religious purposes.

This Court has historically recognized the constitutional distinction between governmental subsidies and tax exemptions that are granted to religious affiliated institutions.

*Waltz v. Tax Commissioner of City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). The distinction between direct aid and indirect aid determines how the aid may be used by the religious affiliated school. As the Court in *Waltz* recognized:

> The court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.

*Id.* 397 U.S. at 668-669, 90 S. Ct. 1409, 1411, 25 L. Ed. 2d 697 (1970).

The Metropolitan Government accepts that direct aid in the form of grants or subsidies to construct or renovate facilities at religious affiliated universities carries with it the concurrent duty to monitor and restrict the use of such facilities to secular purposes. *Tilton v. Richardson*, 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971) rehearing denied, 404 U.S. 876, 92 S. Ct. 24, 30 L. Ed. 2d 123 (1971). Not only are the restrictions required, but they must be enforced for the life of the building.

On the other hand, there are no restrictions placed on how religious affiliated universities spend the money that they would have had to pay in taxes, but for the tax exemptions they enjoy. *Waltz v. Tax Commissioner of City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). Tax exemptions are an indirect benefit to the religious affiliated university and involve no subsidy of taxpayer money. While it would be simple enough to calculate the amount of indirect benefit granted by such tax exemptions, it is not necessary because no restrictions are placed on the savings the religious affiliated universities enjoy.

While a majority of this Court recently rejected the legal proposition that direct aid to religious affiliated schools may be used for both religious and non-religious purposes even if the aid is granted to all schools using neutral criteria, that is not the issue the Metropolitan Government requests this Court to address. *Mitchell v. Helms*, 530 U.S. 793, 893-844, 120 S. Ct. 2530, 2560, 147 L. Ed. 2d 660 (2000). The computer and other equipment in *Mitchell* were purchased with taxpayers' dollars. It clearly was direct aid. Although the plurality in *Mitchell* rejected the inevitability of the "pervasively sectarian" test and allowed "pervasively sectarian" schools to be given a chance to restrict the use of direct aid to secular purposes, ultimately *Mitchell* is a direct aid case. A majority of this Court has continued to maintain the distinction between direct and indirect aid, regardless of whether it is offered to all applicants based upon neutral criteria. The actual diversion of direct government aid to a school's religious mission is currently prohibited. *Id.* 530 U.S. 793, 837-838, 120 S. Ct. 2530, 2556-2557, 147 L. Ed. 2d 660 (2000).

There is no dispute of the facts in this matter. The Metropolitan Government requests the Court to determine whether it must monitor and restrict Lipscomb University from using the facilities for religious purposes. Not one dime of taxpayer money is involved. The loans are approved using neutral criteria. The Sixth Circuit Court of Appeals held that the aid granted in this case was analogous to the aid granted in *Waltz v. Tax Commissioner of the City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). [Pet. App. A. 29a].

Assuming that this Court agrees that this matter is analogous to *Waltz v. Tax Commissioner of the City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), the Metropolitan

Government asks the Court to explicitly reverse *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973). This Court will have had to finally addressed the question left unanswered in that case – whether tax exempt bond financing is direct or indirect aid. Once the Court determines that it is indirect aid, like the aid offered in *Waltz v. Tax Commissioner of the City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), but unlike the aid offered in *Tilton v. Richardson*, 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971), then *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973) ceases to serve any further purpose except to confuse Establishment Clause and Free Exercise Clause jurisprudence.

## CONCLUSION

The conduit tax exempt bond financing provided Lipscomb is indirect aid to a religious affiliated university. It no more offends the Establishment Clause than does the property tax exemption Lipscomb also enjoys. Both benefits require approval by the local government. Neither one should limit how Lipscomb uses the indirect aid when neither type of aid involves a government subsidy and both aid programs are administered according to neutral criteria. To the extent that *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973) continues to confuse current Establishment Clause and Free Exercise Clause jurisprudence, it should be explicitly overruled. Local governments should not have to monitor and restrict the use of indirect aid religious affiliated schools receive.

For these reasons, should the Court grant the petition for writ of certiorari, it should also grant this conditional cross-petition for writ of certiorari.

Respectfully submitted,

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IN THE

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Harold E. Steele *et al.*,

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v.

David Lipscomb University *et al.*,

*Respondents*.

Metropolitan Government of Nashville and Davidson County,

*Cross-Petitioner*,

v.

David Lipscomb University *et al.*,

*Cross-Respondents*.

On Petition and Conditional Cross-Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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## RULE 29.6 STATEMENT

Respondent David Lipscomb University has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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## STATEMENT

Petitioners contend that, because respondent David Lipscomb University is not merely an excellent educational institution but one infused with the teachings of God, it is uniquely forbidden from receiving equal treatment under the law. The federal tax code has long permitted entities that further important social interests to receive financing for capital improvement projects through tax-free industrial revenue bonds issued by private banks and purchased by private individuals. The government's substantial interest in making this financing available to Lipscomb is plain from the University's indisputable track record of academic excellence, which the petition for certiorari omits. The court of appeals was thus clearly correct to recognize that the even-handed availability of tax-free bond financing is not a threat to the principles of the Establishment Clause of the First Amendment, but rather is essential to the government's interest in furthering the education of the citizenry while both remaining neutral towards religion and respecting the free exercise of religious freedoms.

### I. Introduction to David Lipscomb University

#### A. Early History

David Lipscomb and James A. Harding established Lipscomb University as the Nashville Bible School on October 5, 1891. Despite their choice of name for the institution, both men were eager to extend to an underserved region the type of education they had received – a broad-based liberal arts curriculum presented in a Christian context. Each man was well educated for his day. Lipscomb was an 1849 graduate of Franklin College, located in Nashville and the largest college in Tennessee at the time. Franklin emphasized agriculture, but its faculty taught traditional liberal arts subjects. Lipscomb studied Latin, Greek, botany, navigation, surveying, and mental and moral philosophy. Harding graduated in 1869 from Bethany College in Bethany, West Virginia, a lib-

eral arts college whose graduates gave birth to such institutions as Butler University, Culver-Stockton College, and Texas Christian University. Franklin College and Bethany College included Bible instruction as part of their broader curricula, and Lipscomb and Harding held that Bible study was foundational to academic preparation for any career choice or life pursuit.

In founding the Nashville Bible School, Lipscomb wrote, "The supreme purpose of the school shall be to teach the Bible as the revealed will of God to man * * * and to train those who attend in a pure Bible Christianity. * * * Such other branches of learning may be added as will aid in the understanding and teaching of the Scriptures and as will promote usefulness and good citizenship among men." Harding articulated the school's design as being "to train males and females, young and old * * * for the greatest usefulness of life," and asserted the founders' academic goals: "We aspire to stand in the front ranks of the great educational institutions of the world." A medical doctor from the University of Tennessee was retained to teach the sciences in the school's second year. By the mid-1890s the school was noted for its classical education and emphases in Greek and Latin. The founders emphasized in course catalogs the school's openness to all students, its integration of spiritual exploration and academic excellence, and suggested opposition to the notion of their school as seminary. "We propose to present in the way of a liberal education as extensive a curriculum as can be found in any school, college, or university in the land, and at the same time to thoroughly drill its students in the Bible, the divine source of wisdom and goodness. It was not our design to make professional preachers, but to train males and females, young and old, all who might become members of the school, for the greatest usefulness in life. Each student is left to choose his own calling." Catalog, 1896-97.

With the turn of the century, the school took on the broader scope of a small college. Literary societies appeared,

offering competition among students in academic matters such as debate, oratory, and declamation. Alumni attested anecdotally to the validity of the school's educational concept. Batsell Baxter, who later served as president of three universities, including Pepperdine University, said, "After leaving the Nashville Bible School in 1911, I attended in turn three universities. I was agreeably surprised to learn that the instruction received in the Nashville Bible School was as thorough and efficient as the best of instruction in these more pretentious institutions of learning."

**B. Association with Churches of Christ**

Lipscomb and Harding were associated with a fellowship that was becoming known in the late nineteenth century as the Churches of Christ. The Churches of Christ were among three groups that emerged from the American Restoration Movement, which coalesced in 1832 from independent efforts led by men from North Carolina to New England. These leaders believed that divisions among believers in Jesus Christ resulted from creeds that dominated institutional churches. The common belief was that restoring unity among believers could only be accomplished by returning to the Bible, "excluding all human opinions and philosophy, as the only rule of faith and practice," as Lipscomb explained. Despite the attractiveness of this call to many, divisions asserted themselves in the mid-nineteenth century. By the time the Nashville Bible School was established, the Disciples of Christ, the Independent Christian Church, and the Churches of Christ were emerging as distinct identities. Churches of Christ generally held more closely to the ideals of conforming to the New Testament in all congregational practices, subordinating the goal of unity to the goal of strict restoration. Harold Hazelip, *Churches of Christ*, in *Tennessee Encyclopedia of History and Culture* (1998). Churches of Christ

> accept much of mainstream historical orthodoxy as Biblical. Their view of human knowledge of God is that God reveals himself primarily in scripture, ultimately in Christ,

but also in nature. The Bible is accepted as entirely trustworthy. They understand God in Trinitarian terms – as Father, Son, and Holy Spirit. [This view is harmonious with the first four 'ecumenical' councils of the first 500 years A.D. These councils centered on the nature of Christ before and during the Incarnation, and the nature of God as Trinity.] They believe God created everything that exists *ex nihilo*. Evil entered the human experience through the fall of Adam and Eve; original (inherited) sin is not accepted. Jesus is understood to be both God and man; His death accomplished sacrificial atonement for all human beings who genuinely trust in Him. The Christian hope is for eternal life in heaven; eternal punishment is a reality as well.

Hazelip, *supra*.

In addition to congregational autonomy, Churches of Christ are distinguished by *a cappella* music in worship assemblies, observance of the Lord's Supper each Sunday, the priesthood of all believers, rejection of man-made creeds, and the practice of believer's baptism for remission of sins. Congregational autonomy has resulted in a broad range of interpretation as reflected in worship styles that range from very formal to very informal, and in varied beliefs regarding the exclusivity of the church. The term "Churches of Christ" is more appropriate than "Church of Christ" because of this congregational autonomy. Unlike denominations with central organizations that exert influence over individual churches and associated organizations, centers of influence among Churches of Christ tend to be universities, lectureships, and publications. Nineteen colleges and universities are associated with the Churches of Christ. Of these colleges and universities, Lipscomb represents the broadest range of thought that characterizes these churches, with more than seventy individual congregations represented among its teaching faculty and staff. Churches of Christ today include more than two million adherents worldwide, with congregations in most nations.

**C. Development of Mission**

The founders referred to their educational design as a "complete education." Rather than a "finished" education, this vision focuses on the comprehensive development of each student – spiritually, intellectually, socially, and physically – as represented in today's mission statement: "Lipscomb University is a private coeducational institution whose principal focus is undergraduate education in the liberal arts and sciences, combined with a number of preprofessional fields and master's degree programs. Its primary mission is to integrate Christian faith and practice with academic excellence. This mission is carried out not only in the classroom but also by involvement in numerous services to the church and the larger community." Catalog, 2002-03, at 7-8.

The first "wing" of this distinctive, integrated mission, "Christian faith and practice," is approached in several ways. Daily Bible classes and chapel are required for all full-time students. Instructors are encouraged to present a "faith-informed" perspective – the notion that all truth is God's truth and that all knowledge and skills are to be used to God's glory, regardless of the individual's career or life path. Two Scholars in Residence for Christian Studies each year focus on faith-informed learning and provide resources that assist instructors in this pursuit. Students are encouraged to participate in service organizations, and social organizations are encouraged to make service projects central to their activities. Lipscomb offers more than seventy student organizations. Students are also encouraged, while not required, to be active in churches of their choosing, and domestic and international mission programs create additional opportunities for students to exhibit their faith and use their abilities for the good of others. "We want to draw our students into a learning environment that addresses the heart and the mind, and in doing so, to help our students take their faith and begin to understand how to use it in their daily lives. We don't want them to see life as

being fragmented, with their campus life, spiritual life, and academic life as separate components. Instead, we want to teach our students to see life as a whole. We want them to see, act and think like the whole person God made them to be," said Provost Craig Bledsoe (http://academics.lipscomb.edu (last visited Jan. 17, 2003)).

Colossians 3:23-24 says, "Whatever you do, work at it with all your heart, as working for the Lord, not for men, since you know that you will receive an inheritance from the Lord as a reward." Colossians 3:23-24 (New Living Translation). From this spiritual imperative grows the second wing of Lipscomb's mission – academic excellence. Lipscomb is strategically committed to be a nationally recognized Christian university with a premier academic program, encouraging the highest level of performance and service among employees and students. Students are taught by faculty who combine the highest academic preparation with ongoing practical experience and scholarship. Class sizes encourage faculty and students to create relationships that are constructive, beneficial, and personal, and to maintain these relationships throughout life. Academic programs prepare graduates for roles of superior leadership and service in their chosen professions and an enthusiasm for lifelong learning. These programs also encourage students to develop a sense of world citizenship through a geographically and ethnically diverse student body, wide-ranging cultural and professional growth opportunities afforded by the city of Nashville, study-abroad curricula, and foreign mission programs. Classes and a broad program of intramural and intercollegiate athletics encourage the awareness of physical health and growth, and the concepts of leadership, teamwork, sportsmanship, and selflessness.

A comprehensive recitation of historical examples of the consistency and impact of this integration of Christian faith and practice with academic excellence would be prohibitively lengthy, but consider these examples:

• In the 1920s, a church was established by Lipscomb faculty in downtown Nashville that provided shelter and food to persons displaced during the Great Depression years.

• By 1941, Nashville Bible School/David Lipscomb College had influenced the establishment of twenty-three educational institutions, including Pepperdine University, Abilene Christian University, and Harding University.

• In 1954, Lipscomb's International Relations Club hosted a three-day model United Nations Assembly featuring delegates from fifteen mid-South colleges and universities.

• In 1969, Lipscomb student Michael F. Adams, a member of the campus Circle K service organization, was elected president of Circle K International. Lipscomb's Circle K and K-ette programs were the largest campus chapters in the nation for much of the 1970s. Today Adams is president of the University of Georgia, one of approximately twenty alumni who have served as college or university presidents.

• In 1989, a marketing class designed a project by which relief supplies would be gathered, including food and medicines, and shipped with U.S. government assistance to Eastern European countries after the fall of the Berlin Wall. The project was so successful that it grew into a non-profit organization, Healing Hands International, which has distributed more than $47 million in humanitarian aid throughout the world. Faculty and students continue to be instrumental in the success of this organization.

• In fall 2002, more than 300 incoming freshmen participated in local community service projects their first week on campus, as part of an orientation program designed to stimulate an understanding of individual responsibility to the community and a desire to participate. More than 400 students are committed to domestic and international mission and service trips during the present academic year, with activities ranging from medical assistance to house building to evangelism. Another class project, requested by the Metro Nashville Public

School system, provided suggestions for increasing parent participation in schools.

**D. Academic Excellence and Relevance**

The academic excellence that characterized the founders' vision has been a driving force for each successive administration. The college attempted an advance to senior college status in the late 1920s and awarded several bachelor's degrees, but the Great Depression thwarted that initiative. Following World War II, however, this goal was achieved and the college graduated its first senior class in 1948. In 1954, the Commission on Colleges of the Southern Association of Colleges and Schools (SACS) granted accreditation to the college. SACS is a federally sanctioned accrediting body for all institutions in its region – the eleven southern states of the United States and Latin America. The federal government requires educational institutions to be accredited by a regional body such as SACS before institutions are permitted to receive any federal assistance, from building loans to federal student aid. Lipscomb has been granted reaffirmation of accreditation in each ten-year period since its initial accreditation, and in 1988 was granted Level III, or master's degree, status. At that time the institution was renamed Lipscomb University. To receive SACS accreditation, Lipscomb's education quality must undergo careful examination. SACS reviews are conducted by external evaluators who examine curricula offered, qualifications of the faculty, and whether there are sufficient, properly credentialed faculty in each degree program offered by the university; admission procedures and standards, degree requirements, adequacy of financial support, adequacy of facilities, equipment and instructional support for each program; and adequacy of library materials.

In addition to SACS accreditation of the comprehensive educational program, Lipscomb also holds specialized accreditations and approvals in specific areas. These areas include Social Work, accredited by the Council on Social Work Education; the Department of Music, an accredited national

member of the National Association of Schools of Music; the College of Business, accredited by the Association of Collegiate Business Schools and Programs; the Teacher Education Program, approved by the Tennessee State Board of Education and nationally accredited by the National Council for Accreditation of Teacher Education; the Didactic Program in Dietetics, approved by the American Dietetics Association; developmental accreditation of the dietetics internship program by the American Dietetics Association; the Athletic Training Program, accredited by the Commission on the Accreditation of Allied Health Education Programs; and the Professional Chemistry Major, approved by the Committee on Professional Training of the American Chemical Society.

Lipscomb University today offers more than 100 programs leading to bachelor's degrees in five academic colleges and twenty-four departments, featuring more than 800 specific courses. Graduate programs lead to master's degrees in three areas: biblical studies, business administration, and education. An undergraduate evening program is also offered for non-traditional students. On average, approximately 2600 students are enrolled annually in undergraduate and graduate programs. (Approximately 1500 are enrolled in Lipscomb's K-12 academy.) Unlike many institutions widely recognized for quality that employ teaching assistants and graduate students as classroom instructors, classes at Lipscomb are taught by professional faculty, eighty-five percent of whom hold terminal degrees in their teaching emphases. While many of Lipscomb's 109 full-time faculty hold undergraduate degrees from institutions associated with Churches of Christ, their terminal degrees have been awarded by fifty-four different institutions, only one of which is associated with Churches of Christ. This breadth of preparation further illustrates the quality and integrity of the academic program at Lipscomb. Catalog, 2002-03. For nine consecutive years, Lipscomb has been ranked in the top tier of *U.S. News and World Report*'s "Best Universities-Master's" list and other appropriate *U.S. News* rankings.

Students graduating from Lipscomb University during the 2000-2001 academic year, the most recent year for which complete statistics are available, were accepted for graduate or professional study by forty-six institutions, suggesting that a Lipscomb degree represents the high-quality, relevant preparation required for admission. An example of Lipscomb's commitment to adding programs that benefit underserved academic needs and the quality and relevance of such programs is the new Raymond B. Jones School of Engineering. Of the first two engineering graduates, who completed their requirements in May 2002, one was accepted for graduate study with all expenses paid to Harvard University. The second was accepted on a full research assistantship to Vanderbilt University. In addition to its own engineering majors, Lipscomb offers dual-degree programs with Auburn University, Tennessee Technological University, the Nuclear Engineering Department at the University of Tennessee at Knoxville, and Vanderbilt University.

The largest percentage of Lipscomb graduates earns degrees in Business. The "Big 4" accounting firms aggressively recruit Lipscomb graduates, some of whom are now partners in these firms. The chair of the Department of Accounting is a member of the Tennessee State Board of Accountancy, the state regulating board for the accounting industry. Coursework taught at Lipscomb satisfies state requirements to sit for the Certified Public Accountant examination, and for continuing education credit required by the state. The second largest percentage of graduates earns degrees in Education, and Lipscomb courses meet state requirements for licensure. More than 800 Lipscomb graduates are teachers in Tennessee public schools. Because this program is approved by the State of Tennessee, graduates may also teach in forty-five other states with which Tennessee has reciprocal agreements. The fastest growing academic area since 1995 has been the College of Bible, and Lipscomb was the first institution associated with Churches of Christ to offer a children's ministry concentration in its Bible major. Many students attend Lipscomb be-

cause of its exceptional rate in placing graduates into medical and medically related schools. At the conclusion of the 2001-2002 academic year, 100% of students applying to medical schools during the year were accepted. Ninety-seven percent of all students applying to medical or medically related schools were accepted. These statistics demonstrate that Lipscomb programs meet or exceed established standards for entering medical professions following completion of applicable medical, nursing, or medically related professional programs. Lipscomb offers a joint bachelor's degree program in nursing with Belmont University, and a joint program that leads to bachelor's and master's degrees in nursing from Vanderbilt University. Lipscomb also offers a joint program in medical technology with Vanderbilt. Substantial numbers of graduates enter a wide range of other professions, including law and public service. Many of these graduates enter careers in the Nashville area, serving the public good by contributing to economic health and quality of life in the community.

**E. Facility Growth and Development**

Throughout its history, Lipscomb University's facilities have been expanded and enhanced as would be expected of a leading educational institution. Significant facility expansion and improvement have resulted from student body growth, addition or enhancement of educational programs to meet heightened educational demands of a changing world, and technological advancements. Anticipating a large influx of returning World War II veterans and a move to senior college status, the Lipscomb Expansion Program began in 1944, resulting in the addition of College Hall (now Burton Bible Building), McQuiddy Gymnasium, Crisman Memorial Library, temporary science facilities, and new and expanded residential facilities, by 1952. Fanning Hall, a women's residence, High Rise Dormitory for men, McFarland Hall of Science, and the Dining Center were added in the 1960s. Another wave of construction resulted in Yearwood Hall, a women's

residence, in 1983, and the Axel W. Swang Center for Business Administration in 1984.

The 1986 reaffirmation of accreditation by the Commission on Colleges of the Southern Association of Colleges and Schools noted a dramatic need for new facilities to replace the aging Crisman Library and to provide recreational and physical education space. These facilities were included in an initiative that was substantially complete by the university's centennial in 1991 and resulted in Beaman Library, the Student Activities Center, an addition to the Swang Center, renovation of Crisman for use as an administration building, installation of a campus-wide fiber-optic data network, and a variety of campus beautification projects. Since 1997, Elam, Sewell and High Rise residences have been renovated, the Dining Center was "reinvented" into a true Student Center, and Allen Arena, a 5028-seat multipurpose facility, opened in October 2001. Yearwood Hall was eliminated in the construction of Allen Arena.

**F. Conclusion**

The key point to derive from these evidences of quality is that Lipscomb's commitment to Christian values serves to enhance the pursuit of excellence in all areas. Lipscomb delivers Christ-centered liberal arts and professional education for students and parents of all backgrounds who seek a premier academic program in a Christian context to prepare graduates for lives of superior leadership and service. Students are taught from a faith-informed perspective by highly trained and experienced faculty who encourage scholarship and spiritual exploration in a location that enhances education, resulting in preparation of the total individual for life and eternity.

## II. Procedural History

1. In early 1991, respondent Industrial Development Board (the "Board") of the Metropolitan Government of Nashville and Davidson County ("Metro") issued the tax-

exempt bonds at issue in this case in the aggregate principal amount of $15,000,000 (the "Bonds"). The Bonds were issued to the public pursuant to the Board's authority under Tenn. Code Ann. § 7-53-101(11)(A)(vii) for the financing of "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of the institution." Lipscomb, as an institution of unimpeachable academic excellence, satisfied all of the procedural and other legal requirements of the Board.

The government's role was ministerial. The Bonds were sold to private investors (bondholders), and the proceeds from the Bonds were loaned to Lipscomb, pursuant to loan documents by the Board, without recourse against or warranty by the Board. The loan documents were assigned to the predecessor in interest of respondent NationsBank/Tennessee ("NationsBank"), as trustee for the bondholders. Lipscomb is unconditionally obligated under the loan documents to pay all sums due on the Bonds, and neither the Board nor Metro has any further involvement with the Bonds or with Lipscomb in connection with this transaction. NationsBank is responsible for enforcing the loan documents. Repayment of the Bonds is secured by a letter of credit issued by NationsBank which, in turn, is secured by Lipscomb's credit and a mortgage on Lipscomb's property.

Pursuant to federal law – which does not discriminate against institutions that further important social purposes because they are institutions of faith – the income earned on the Bonds by the bondholders is exempt from federal and state income tax under relevant provisions of the Internal Revenue Code and the Tennessee Code. Because of the tax-exempt status of the Bonds, in the marketplace for these types of investments the Bonds carry a lower interest rate than would be the case if the interest were taxable. Accordingly, the loan to Lipscomb of the proceeds realized from the sale of the Bonds in the open market carries a lower interest rate than would be charged if the Bonds were taxable.

No taxpayer money has gone to Lipscomb. The Bonds do not constitute an indebtedness of either the Board or Metro. Under no circumstances will the Board or Metro become liable to pay any portion of the principal or interest on the Bonds or any costs incidental to their issuance. The Bonds do not involve any expenditure of public funds, any reimbursement by the Board of expenditures made by Lipscomb, or any commitment or extension of credit by the Board. The Board is a mere conduit of private investor money through which educational institutions (and other entities), such as Lipscomb, may borrow funds on the basis of their own credit and security at a more favorable interest rate than that available through more conventional financing. That borrowing is available without regard to the religious affiliation of an otherwise worthy institution.

The Bond documents restrict the use of the Bond proceeds that were loaned to Lipscomb. The proceeds were used to further Lipscomb's mission as an institution of academic excellence. The Bond proceeds were used only for certain designated secular construction projects, including a new library, a new intramural athletics building, certain athletic fields, an addition to the Lipscomb Business Center (its business school), computer fiber-optic equipment, and renovation of the old library into administrative offices. None of the proceeds from the Bonds could be used for constructing, renovating or equipping Lipscomb's Chapel or any other place of religious worship, Lipscomb's Department of Bible, or any other place of sectarian or divinity instruction, or any place for training of ministers or other similar persons in the religious field.

2. Petitioners are residents of Davidson County, Tennessee. On May 30, 1991, shortly after the Bond transaction was closed, petitioners filed their complaint in this action in the U.S. District Court for the Middle District of Tennessee. Petitioners' position throughout the case has been that Lipscomb is "pervasively sectarian" and, for that reason alone, the Bond

financing violated the Establishment Clause of the First Amendment. Petitioners' position is thus that pervasively sectarian institutions such as Lipscomb are *uniquely forbidden* in this country from receiving financing on equal footing with other entities.

The district court held that the issuance of the bonds violated the Constitution's Establishment Clause. At the outset, the district court concluded that, on the basis of Lipscomb's principles, the University is a "pervasively sectarian" institution. Pet. App. 115a-129a. The district court then held the bond financing unconstitutional because the government was the source of the loan, Lipscomb was the beneficiary, and the Bonds were direct rather than indirect aid. Although recognizing that the "loan came from [the bank] and was repaid to [the bank]," the court deemed dispositive that nominally "it was still a loan from the Board" (*id.* 132a) and "Lipscomb intentionally sought governmental financing instead of private financing" (*id.*).

The district court also expressed its concern that restrictions on use of the bond proceeds for sectarian purposes would not be enforced, given that the government had "remov[ed] itself from the details of the financial transaction." Pet. App. 154a. Thus, under the loan instruments, the government was absolved of "responsibility for enforcing the use restriction." *Id.*

Finally, the district court concluded that the bond financing would be perceived as a governmental endorsement of religion. The bond paperwork, the court explained, "would clearly connect the Board to Metro and both to the project benefiting David Lipscomb University." Pet. App. 165a. Because that paperwork also acknowledged Lipscomb's pervasively sectarian nature, it sends a message that the government "is endorsing the sectarian beliefs and teachings of Lipscomb University." *Id.* 167a.

Accordingly, the district court entered "[a] permanent injunction * * * prohibiting the Industrial Development Board

and Metropolitan Government from issuing additional tax-exempt bonds to Lipscomb or bonds to any other pervasively sectarian institution." Pet. App. 168a.

3. A divided panel of the Sixth Circuit reversed. The majority noted at the outset that every court confronted with a similar program has "found that the issuance of industrial revenue bonds is not tantamount to the giving of direct aid to religious schools." *Id.* 11a n.4.

The panel majority focused on the form and substance of the bonds: they "do not constitute an indebtedness" of the government; the government cannot "be held liable to pay any portion of the principal or interest * * * or any costs incident to their issuance"; and no "tax revenues have been or will be spent as a result." Pet. App. 4a. The institution seeking the bonds must itself "arrange the financing by locating exclusively private lenders of the funds." *Id.* 23a. Further, "the Board provides [such] pass-through or conduit financing services to a wide variety of nonreligious and religious non-profit organizations." *Id.* 18a. Although the government must formally issue the bonds, that "stems from the simple fact that the Internal Revenue Code excludes from income taxation only interest paid on industrial revenue bonds issued and approved by a state or local governmental unit." *Id.* 24a.

The majority concluded that the bond program is most analogous to a neutral tax exemption, which this Court has long held "is not sponsorship" of religion (*Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970), *quoted in* Pet. App. 18a), or to a "general governmental benefit[]" that is consistent with the Establishment Clause (*Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), *quoted in* Pet. App. 26a). The majority also recognized that the bond program offended no constitutional principle under the "modified *Lemon* test." Pet. App. 26a-27a (citing *Zelman* v. *Simmons-Harris*, 122 S. Ct. 2460, 2476 (2002) (O'Connor, J., concurring)). "As to the primary purpose, industrial revenue bonds advance a clear governmental, secular interest in promoting economic and

educational development." *Id.* 27a. "As to the program's primary effect, tax free revenue bonds have neither the effect of advancing or inhibiting religion," but rather produce "economic and educational development." *Id.* 28a. "Similarly, * * * the objective observer of Metro's industrial revenue bond program, knowing the history and context of this program, would reasonably view it as one aspect of a broader undertaking to finance economic development, not as an endorsement of religious schooling in general." *Id.* 29a.

Judge Clay, arguing in dissent that the bond financing was unconstitutional, deemed it "sufficient that the government makes it possible for [a pervasively sectarian] institution to obtain economic aid that it would not otherwise be able to obtain without the government's direct participation." Pet. App. 73a. "That no governmental funds actually reach the coffers of the pervasively sectarian educational institution does not alter for one moment the fact that a direct economic benefit accrues to such an institution as a result of the government's active participation in arranging for a low-cost loan that enables the institution to advance its sectarian mission." *Id.*

## REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied. Although the question presented is of indisputable importance, there is no conflict in the lower courts. Because the law is already uniform, this Court's intervention is not necessitated. The court of appeals' decision furthermore adheres to this Court's Establishment Clause precedents. The conditional cross-petition of the Metropolitan Government, which in any event does not seek to alter any portion of the judgment below, should accordingly be denied as well.

1. Petitioners assert that the petition presents an important and recurring question of federal law. That is correct because the availability of tax-exempt bond financing is nothing less

than essential to the ability of a wide variety of institutions to undertake capital improvement projects.

For more than 110 years, Lipscomb University and its predecessors have endeavored to offer a liberal arts curriculum of the very highest quality that is furthermore founded on the Bible and the teachings of the Churches of Christ. But the University is not merely an intellectual and spiritual space. It requires facilities – such as an excellent library, a gymnasium for athletics, expanded classrooms, and enhanced technology – to continue to thrive and fulfill its mission for students, faculty, and the community. Lipscomb, like most colleges and universities of its size, lacks the endowment required to finance large-scale capital improvements of this sort without lending. Private financing is therefore essential and, as a simple matter of economics, the interest rate available on that lending has direct consequences for the amount of financing the University can secure. In this case, for example, the availability of tax-free bonds saved Lipscomb thirty percent on the financing cost of the capital improvement project.

Although the question presented – which addresses whether the Constitution forbids entities such as Lipscomb University from receiving tax-free bond financing on equal terms with secular institutions – is thus important, not every important question of federal law is reviewed by this Court immediately, if ever. Petitioners cannot, and candidly do not, argue that the question is the subject of a conflict in the lower courts. To the contrary, it is undisputed that every court to consider the question has "found that the issuance of industrial revenue bonds is not tantamount to the giving of direct aid to religious schools." Pet. App. 11a n.4. The majority below identified nearly a dozen decisions so holding since 1968, including most recently *Virginia College Building Authority* v. *Lynn*, 538 S.E.2d 682 (Va. 2000). Such a uniform line of lower court authority itself belies petitioners' claim that the Sixth Circuit's decision conflicts with this Court's precedents.

Nor is review warranted on the ground that "[n]o other *federal appellate* court * * * has addressed the issue of whether a local government's issuance of tax exempt revenue bonds to finance a low interest loan to a pervasively sectarian educational institution constitutes direct aid that violates the Establishment clause." Pet. 17 (emphasis added). The Fourth Circuit has decided a similar question in a manner consistent with the decision below, holding that the Establishment Clause is not violated by a state aid program that utilizes similarly neutral criteria and that includes safeguards against the diversion of funds, even when the aid is provided to a pervasively sectarian college. *Columbia Union College* v. *Oliver*, 254 F.3d 496 (2001). But in any event, the fact that a question has not percolated in the lower federal courts is an established ground for denying certiorari. That result is warranted when, as in this case, there is no asserted basis for requiring this Court's immediate intervention.

2. Nor is there merit to petitioners' argument that certiorari should be granted because the decision below purportedly conflicts with *Tilton* v. *Richardson*, 403 U.S. 672 (1971), *Hunt* v. *McNair*, 413 U.S. 734 (1973), or *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976). To the contrary, as petitioners elsewhere contend, the question presented "has not been" decided "by this Court." Pet. 17 (title). Further, *Tilton*, *Hunt*, and *Roemer* could present no conflict with the ruling in this case, for each of those decisions *sustained* programs that provided aid to religious institutions. See *Roemer*, 426 U.S. 736 (government per-student subsidy); *Tilton*, 403 U.S. 672 (government construction grants); *Hunt*, 413 U.S. 734 (bond financing).

Although petitioners are correct that the bond financing in *Hunt* resembles the program at issue in this case, the relevant point is that this Court strongly indicated that such a program presents no constitutional concern even when the recipient is a pervasively sectarian institution:

> The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "government service." The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit."

413 U.S. at 745 n.7. The Sixth Circuit properly recognized that the government played the indistinguishable role of a "mere conduit" in the bond financing at issue in this case.

Petitioners thus actually rely on *Tilton*, *Hunt*, and *McNair* for the basic proposition that the government may not provide "direct aid" to a pervasively sectarian institution. That is a hotly debated issue to be sure (see *Mitchell* v. *Helms*, 530 U.S. 793 (2000)), but it is not one presented by this case. The Sixth Circuit recognized that the lower courts "are still bound by pre-*Mitchell* law with regard to the pervasively sectarian doctrine." Pet. App. 14a. See also *id.* 15a ("It is for the Supreme Court, not this Court, to jettison the pervasively sectarian test, which it has not done."). Petitioners' contention that the court of appeals "failed to hold that local government[s] cannot provide direct financial aid to a pervasively sectarian institution" (Pet. 9) thus simply mischaracterizes the decision below.

As petitioners elsewhere acknowledge, the court of appeals actually rejected their constitutional challenge because

"the nature of the aid conferred by the tax exempt revenue bonds is not direct and the revenue bond program does not present the perception of government endorsement of religion." Pet. 9. That holding presents no conflict with *Tilton*, *Hunt*, or *McNair*, which did not consider the dividing line between "direct" and "indirect" aid or any relevant issue relating to endorsement. The only exception is that, as noted, *Hunt* suggested that a bond program such as the one at issue in this case presents no issue under the Establishment Clause.

Petitioners' contrary reliance on *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), is misplaced. This Court in *Rosenberger* cited *Hunt* as one in the line of cases establishing "the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." 515 U.S. at 842. But petitioners make an extraordinary leap in contending that this statement in *Rosenberger* "implicitly recognized the bond proceeds loan structure in [*Hunt*] as an example of direct state aid." Pet. 12. Nothing in this dictum from *Rosenberger* purported to characterize the program at issue in *Hunt* as "direct aid."

Citing no decision of this Court, petitioners nonetheless assert that the financing received by Lipscomb "provided a direct financial benefit which had the principal or primary effect of advancing religion." Pet. 11. This argument, however, elides the very distinction between direct and indirect aid, for receiving a "direct financial benefit" is not the same thing as receiving that benefit "directly from the government." Indeed, it is a stretch to characterize the government's role in the bond financing as "aid" at all. Although the federal tax laws required the Board and Metro to formally approve the Bonds, the financing is entirely private, it was arranged by Lipscomb, and no one has recourse in any respect against the government.

Petitioners thus err in attempting to characterize the bond financing as "not a passive benefit but rather * * * similar to a

general subsidy." Pet. 12. Petitioners rely only on Justice Brennan's concurrence in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). But even that solo opinion rejects petitioners' argument: "A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a whole." *Id.* at 690. The Bonds, of course, were financed with purely private, not taxpayer, funds, as petitioners concede. Pet. 13 ("no state funds were transferred through [the] revenue bond financing employed in this case").

Again citing no decision of this Court, petitioners next attempt to fault the bond financing as purportedly "result[ing] in excessive governmental entanglement with the religious mission of the University." Pet. 14. But even the district court recognized that the Bonds were immediately assumed by private entities such that the Board and Metro have no ongoing role in their administration or collection. Pet. App. 154a. Indeed, petitioners themselves embrace the district court's conclusion that "the government has abdicated any responsibility for enforcing the use restriction." Pet. 14-15.

Petitioners' argument thus seems to be instead that "no safeguard can ensure that direct monetary aid, even if designated to fund the school's secular activities, will not aid its religious mission." Pet. 14. Even if it were correct that the bond financing at issue in this case indirectly advanced Lipscomb's sectarian activities, that is not "entanglement." Instead, it is simply a restatement of petitioners' flawed premise that the Bonds represent "direct" governmental aid.

Finally, there is no merit to petitioners' argument that "the perception of a reasonable observer would be that the Board and Metro were endorsing Lipscomb and its sectarian purpose and beliefs." Pet. 15. Petitioners rely entirely on the fact that the formal approval documents describe Lipscomb and its mission. *Id.* The Sixth Circuit correctly recognized, however, that "the objective observer of Metro's industrial revenue bond program, knowing the history and context of this

program, would reasonably view it as one aspect of a broader undertaking to finance economic development * * *. Metro no more endorsed Lipscomb University than it did Wal-Mart in issuing industrial revenue bonds." Pet. App. 29a.

Nor can petitioners' arguments be reconciled with this Court's leading recent Establishment Clause precedents. Like the voucher program in *Zelman* v. *Simmons-Harris*, 122 S. Ct. 2460 (2002), the bond financing program at issue in this case is neutral as between secular and sectarian institutions. It furthermore rests on the decision of private banks to finance the Bonds and the further private decision of individuals to purchase the Bonds. The government's "role ends with the disbursement of benefits." *Id.* at 2467. Indeed, the only relevant distinction between *Zelman* and this case is that the vouchers were paid with public monies while the Bonds were not.

Petitioners' position is also precluded by *Mitchell* v. *Helms*, 530 U.S. 793 (2000). Like the educational assistance program sustained in *Mitchell*, the bonds at issue in this case are awarded based on wholly neutral criteria. Further, the financing received under the Bonds is entirely secular and safeguards exist to ensure that funds are not diverted to religious uses. The critical difference is that this case, unlike *Mitchell*, does *not* involve "direct" aid to religious institutions.

3. Because the petition for certiorari should be denied, the conditional cross-petition of the Metropolitan Government should be denied as well. See S. Ct. R. 13.4. But in any event, the cross-petition should be denied because it does not "seek[] to change the judgment below or any part thereof." Robert L. Stern et al., *Supreme Court Practice* § 6.35, at 444 (8th ed. 2002). The Metropolitan Government urges this Court to decide that indirect governmental aid "may be used for religious purposes" by pervasively sectarian institutions. Cross-Pet. i. But because the court of appeals ruled that the bond program at issue in this case does not offend the Estab-

lishment Clause, a holding in Metro's favor by this Court on the question presented by the cross-petition would not have the effect of altering the judgment below.

## CONCLUSION

For the foregoing reasons, the petition for certiorari and the conditional cross-petition of the Metropolitan Government should be denied.

Respectfully submitted,

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